

III. CURRENT NEW JERSEY LAW PERTAINING TO SEXUAL ORIENTATION

A. Foreword

Throughout this report, use of the term "homosexual", which most frequently appears in quoted material, should be read to include both gay men and lesbian women. Our own text prefers the term "gay/lesbian" to refer to gays, lesbians and bisexuals.

B. Introduction

A survey of current New Jersey law reveals a clear public policy against discrimination based on sexual orientation. Most exceptions to this general rule are related to the unavailability of marriage to same-sex couples¹; for example, in the denial of fringe benefits tied to marriage. However, in areas such as civil rights and family law, the legislature has expressed -- and the courts have recognized -- that individuals generally have the right to be free from discrimination on the basis of sexual orientation.

C. Historical Background

Laws specifically directed at the rights of individuals on the basis of their sexual orientation are relatively new. However, even in the past New Jersey law-makers and courts have considered the subject, albeit sporadically, in a variety of settings and with a variety of results, some concentrating solely on particular individual situations and others reflecting broader, changing societal norms.

A striking early attempt to regulate sexual conduct in New Jersey appeared in an 1898 criminal statute prohibiting sodomy:

Sodomy, or the infamous crime against nature, committed with man or beast, shall be high misdemeanor, and punished by fine not exceeding one thousand dollars, or imprisonment at hard labor not exceeding twenty-one years, or both.
[L.1898, c. 235, §44]

The seriousness with which this offense was viewed apparent from the harsh penalty. Eventually, however, New Jersey's anti-sodomy statutes, N.J.S.A. 2A:143-1, -2, were declared unconstitutional in State v. Ciuffini, 164 N.J. Super. 145 (App. Div. 1978). See also, State v. J.O., 69 N.J. 574 (1976), both discussed below. These statutes were repealed by L.1978, c. 95; N.J.S.A. 2C:98-2, eff. September 1, 1979, as part of the general overhaul of the criminal code.

One early case recognizing that sexual orientation was not a valid justification for differential treatment arose in the context of alcohol licensing. In 1967, the New Jersey Supreme Court reversed the Division of Alcoholic Beverage Control for suspending or

revoking the licenses of bars where "apparent homosexuals" were permitted to congregate. One Eleven Wines & Liquors, Inc. v. Div. of A.B.C., 50 N.J. 329 (1967).² Noting the lack of any evidence of actual lewd or immoral conduct on the premises, the Court observed that "despite increasing public tolerance and understanding" of gays and lesbians, the State Division of Alcoholic Beverage Control had repeatedly held that "permitting ... apparent homosexuals to congregate" constituted a public nuisance. Id. at 332. The Court, using language that by today's standards seems somewhat archaic, said:

Though in our culture homosexuals are indeed unfortunates, their status does not make them criminals or outlaws. So long as their public behavior violates no legal proscriptions they have the undoubted right to congregate in public. And so long as their public behavior conforms with currently acceptable standards of decency and morality, they may, at least in the present context, be viewed as having the equal right to congregate within licensed establishments such as taverns, restaurants and the like. [Id. at 339; citations omitted]

The Court observed both the historical and prospective significance of its decision.

When in the 1930's the Department of Alcoholic Beverage Control first took its severe [anti-gay] position, it acted on the assumption that the mere congregation of apparent homosexuals had to be outlawed to achieve effective control. It of course had no experience to support the assumption but it took the prohibitory course as the safer one for the then fledgling system. At the time, the interests of the patrons in question were given little consideration and were in any event overwhelmed by the then highly felt transitional need for sweeping restraint. Now, in the 1960's, the transitional need as such is long past and it is entirely appropriate that full sweep be given to current understandings and concepts. Under them it seems clear that, so long as the division can deal effectively with the matter through lesser regulations which do not impair the rights of well behaved apparent homosexuals to patronize and meet in licensed premises, it should do so. [Id. at 341]³

Not all cases since One Eleven Wines & Liquors have been decided in favor of gay rights. For example, Gish v. Paramus Bd. of Ed., 145 N.J. Super. 96 (App. Div. 1976), cert. den. 74 N.J. 251 (1977), cert. den. 434 U.S. 879 (1977), upheld a Board of Education's directive that a public school teacher submit to a psychiatric examination because of his actions in support of "gay rights." Of note is that this determination had been corroborated by two psychiatrists who opined that the teacher's behavior displayed evidence of "deviation from

normal mental health," which might affect his ability to teach, discipline and associate with students.⁴ Based on this, it was concluded that the Board of Education's directive was fair and reasonable and did not constitute a violation of the teacher's First or Fourteenth Amendment rights.

Despite the ruling in Gish, the overall context of New Jersey case law concerning sexual orientation, especially during the past 25 or 30 years, has evolved considerably. Even before sexual orientation became a protected classification under New Jersey's anti-discrimination law, a willingness to recognize the rights of gay individuals began to emerge. Legislative and judicial actions in the years following the One Eleven Wines & Liquors case reflect a progressive change in attitudes toward homosexuality by the legal and psychiatric communities as well as the increasing strength of an organized political movement aimed at achieving rights for gays and lesbians.⁵

D. Current Law

What follows is a brief outline of current statutory and decisional law addressing individual rights, protections and privileges for gays and lesbians. Note, too, that although early New Jersey law ameliorating the legal position of gays and lesbians appeared to focus on status alone, our contemporary law quite clearly encompasses protection against discrimination on the basis of behavior as well.

1. Civil Rights Law

The most comprehensive legal expression of protection against sexual orientation discrimination is found in the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1, et seq. The LAD prohibits discrimination based on an assortment of classifications (e.g., race, gender, age, etc.) in the areas of employment, housing and access to places of public accommodation.⁶ The law was amended in 1991 to include "affectional or sexual orientation" as a prohibited basis of discrimination.⁷ "Affectional or sexual orientation" is defined as: "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." N.J.S.A. 10:5-5hh. The constitutionality of this statutory amendment was upheld in Orthodox Presbytery of New Jersey v. Florio, 99 F.3d 101 (3d. Cir. 1996), cert. den. 117 S.Ct. 1334 (1997), where the Third Circuit rejected a religious institution's allegations that the protection of sexual orientation from the enumerated types of discrimination interfered with the free exercise of religion and the right to free speech.

The Legislature has generally expressed its strong anti-discrimination policy regarding all of the protected classes. It has said that discrimination on the basis of sexual orientation "threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State." N.J.S.A. 10:5-3. It opposes such practices "in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured." Ibid. Moreover, all persons

are assured "the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of ... sexual orientation.... This opportunity is recognized as and declared to be a civil right." N.J.S.A. 10:5-4.

These rights are not to be compromised by an individual's self-declaration of his or her sexual orientation. Such expression is "inextricably linked" to the individual's status as a gay man or lesbian. Dale v. Boy Scouts of America, 160 N.J. 562, 642 (Handler, J., concurring) (1999), rev. on other gr. 120 S.Ct. 2446 (2000).

Self-identifying speech that serves only to reveal the status of the speaker is always vulnerable to misinterpretation and misunderstanding based on stereotypes that are associated with the speaker's status. The reliance on such stereotypes to import additional meaning to self-identifying speech is impermissible Such stereotypes, baseless assumptions, and unsupported generalizations reflecting a discredited view of homosexuality as criminal, immoral and improper are discordant with current law and public policy. [160 N.J. 645, 651]

The LAD is intended to eliminate these destructive consequences of discrimination from our society. Id. at 646- 47.

a. Employment

A large number of cases arising under the LAD involve employment discrimination. Sexual orientation is among the categories protected in this context. The statute makes it unlawful to refuse to hire or employ someone, or to bar from employment, fire or force such person to retire for discriminatory purposes. Also prohibited is discrimination in compensation or in the terms, conditions or privileges of employment. N.J.S.A. 10:5-12. Employers may not express any limitation regarding sexual orientation -- directly or indirectly -- in advertising or employment applications or make inquiries into the sexual orientation of prospective employees.

b. Harassment

Sexual harassment in the workplace is a form of sex discrimination. In Lehmann v. Toys 'R' Us, 132 N.J. 587 (1993), the Court indicated that the LAD covers same-sex as well as opposite-sex sexual harassment. See also Zalewski v. Overlook Hosp., 300 N.J. Super. 202 (Law Div. 1996) (holding that acts committed by heterosexual co-workers against another heterosexual employee who was perceived to be a virgin constituted sexual harassment actionable under the LAD). Similarly, the United States Supreme Court held

that same-sex sexual harassment is actionable under federal Title VII in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

c. Public Accommodations

The LAD forbids discrimination in access to places of public accommodation. There can be no discrimination in the furnishing of the accommodations, advantages, facilities or privileges of any such public place by anyone having control of it. N.J.S.A. 10:5-12f. Places of public accommodation include a wide variety of establishments, ranging from hotels, restaurants, taverns and theaters to hospitals, schools and colleges. N.J.S.A. 10:5-5l. Excluded from this category are distinctly private clubs. N.J.S.A. 10:5-5l. Case law has construed the term "public accommodation" broadly, holding that it does not necessarily hinge on a fixed physical place. For example, in National Organization For Women v. Little League Baseball, 127 N.J.Super. 522, 530 (App. Div. 1974), *aff'd* 67 N.J. 320 (1974), it was held that Little League baseball is a place of public accommodation, and therefore available to girls as well as boys, because the invitation to join had been open to children in the community at large with no restriction (other than gender). This was so even though the organization did not necessarily operate from a specific, exclusive parcel of land.

In its most comprehensive discussion of this subject to date, the New Jersey Supreme Court concluded that the Boy Scouts of America is a place of public accommodation and could not exclude the plaintiff from his position as assistant scoutmaster solely on the basis that he had publicly declared his homosexuality. Dale v. Boy Scouts of America, *supra*, 160 N.J. 562. In reaching its conclusion that the Boy Scouts is a place of public accommodation and none of the LAD exemptions apply, the Court considered: the Scouts' broad public solicitation of members; its close relationships with governmental bodies and other recognized public accommodations (including public schools and other school-affiliated groups), and the absence of a selective membership policy. By expelling plaintiff, the Scouts had "undeniably" violated the LAD by depriving him of the privileges and advantages of a public accommodation. *Id.* at 604.

The United States Supreme Court reversed the New Jersey Supreme Court's decision Boy Scouts of America v. James Dale, 120 S.Ct. 2446 (2000). The question the United States Supreme Court addressed was whether applying the New Jersey public accommodations law in the manner done by the New Jersey Supreme Court would violate the Boy Scout's First Amendment Right of expressive association. The Supreme Court held that application of the law in such a manner did violate the organization's First Amendment rights.

The U.S. Supreme Court determined that the application of the New Jersey public accommodation law in this case unnecessarily restricted the Scouts' freedom of expressive association. The U.S. Supreme Court recognized that it was within New Jersey's power to enact such a law when the Legislature has reason to believe that a given group is the target of discrimination and the law does not violate the First Amendment. The U.S. Supreme Court concluded that a State requirement that the Boy Scouts retain Dale would

significantly burden the organization's right to oppose or disfavor homosexual conduct. The State interests embodied in New Jersey's public accommodation law do not justify such a severe intrusion on the freedom of expressive association.

d. Housing

With respect to housing, the Law Against Discrimination makes it unlawful to refuse to sell, rent, lease, assign or sublease real property for a discriminatory reason. N.J.S.A. 10:5-12g. This also pertains to the terms, conditions or privileges of any real property transaction, and no real estate advertisement may contain discriminatory language. Besides owners, lessees and managers, the law also applies to brokers, salespeople and their agents and employees. N.J.S.A. 10:5-12h.

Even before the LAD was amended to include sexual orientation as a protected category, the New Jersey Supreme Court held that refusal to show or rent a listed apartment to a young unmarried woman because of her intent to share the apartment with another young unmarried woman is a violation of the LAD as discrimination on the basis of sex and marital status. Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973).

e. Lending

No person engaged in money lending, including banks, mortgage companies, insurance companies, and financial or credit institutions, may discriminate against loan applicants. N.J.S.A. 10:5-12i. This provision pertains to the granting of loans as well as rates and other terms and conditions. It also forbids discriminatory inquiries on forms or in any other application process.

f. Refusal To Do Business

While other parts of the LAD pertain to specific people or entities, e.g., employers, realtors, etc., N.J.S.A. 10:5-12l makes it unlawful for any person to refuse to engage in business transactions with another person for discriminatory reasons. This provision is essentially concerned with buying and selling goods and other transactional contracts.

g. Public Contracts

Bidders for public contracts must afford equal opportunities to minority workers and subcontractors; however, as to sexual orientation only, they are not required to engage in affirmative action. N.J.S.A. 10:5-32, -34. See also N.J.S.A. 10:2-1, providing that persons operating pursuant to a public works contract may not discriminate in hiring against any

qualified person on the basis of sexual orientation and may not intimidate any worker on account of sexual orientation.

h. Reprisal

Every aggrieved person has the unfettered right to complain about discrimination without fear of reprisal. This provision is applicable to any discrimination complaint; however, reprisal is frequently an issue in employment situations, where one who remains in his or her position may jeopardize job security and comfort by pursuing remediation. Pursuant to N.J.S.A. 10:5-12d, any person who has opposed an act or practice forbidden by the LAD is expressly protected against retaliation by any other person, not simply by the employer. This covers all expressions of opposition to discrimination, including, for example, complaints to supervisors, formal internal grievances, or the filing of a formal complaint with the Division on Civil Rights (DCR) or in court. Also specifically prohibited is reprisal because a person "has ... testified or assisted in any proceeding under [the LAD]." N.J.S.A. 10:5-12d. Importantly, the reprisal cause of action is separate and apart from the underlying charge of discrimination, and a party complaining of reprisal may prevail even if the original discrimination complaint is unsuccessful. Because the statute endows this right on any "person" who suffers reprisal, a cause of action may be pursued not only by the employee who alleges discrimination but also by co-workers or other associates of the employee who fulfill the provision's other requirements. See Craig v. Suburban Cablevision, 140 N.J. 623 (1995).

2. Family Law

Changes in New Jersey statutory and case law have clarified and enlarged the rights of people to receive equal treatment in the area of family law, irrespective of their sexual orientation. Most notably are developments in cases of adoption and custody.

a. Adoption

N.J.S.A. 9:3-43, which allows "any person" to institute action for adoption, permits unmarried persons, regardless of sexual orientation, to adopt. In the Matter of the Adoption of Two Children by H.N.R., 285 N.J. Super. 1 (App. Div. 1995). Although it does not preclude joint adoption by unmarried prospective parents, until recently the New Jersey Department of Human Services, Division of Youth and Family Services (DYFS), had a formalized internal policy to deny consent for joint adoptions by unmarried couples. This required one parent to go through the adoption process first, followed by a "second-parent" adoption by the other. In a Consent Judgment signed by the Superior Court, Chancery Division in 1997, however, DYFS agreed to repeal this policy and to treat unmarried couples the same as married couples for purposes of adoption. Holden, et al. v. New Jersey Department of Human Services, No. C-203-97 (Ch. Div., December 17, 1997). Accordingly, following a judicial determination that adoption by a gay couple was in the best interest of the child, In the Matter of the Adoption of a Child by Jon Holden and Michael Galluccio, No. 13,561 (Ch.

Div., Oct. 22, 1997), the adoptive male parents were permitted to proceed jointly rather than in separate actions.

The polestar of an adoption is the best interests of the child. N.J.S.A. 9:3-48f; In the Matter of the Adoption of Baby T., 311 N.J. Super. 408, 414 (App. Div. 1998). In considering what is in the best interest of the child, the sexual orientation of the prospective adoptive parent is not a dispositive factor. Adoption of a child by the biological mother's lesbian lover, for example, has been found to be in the best interest of the child. Sexual orientation of the parent can become a factor in a court's decision and be dispositive only if proven that something related to the parent's sexual orientation adversely affects the child. In the Matter of the Adoption of a Child by I.M.G., 267 N.J. Super. 622 (Ch. Div. 1993). See also, In re the Adoption of Two Children by H.N.R., 285 N.J. Super. 1 (App. Div. 1995) (granting a second parent adoption to the lesbian partner of a biological parent of two children).

b. Child Custody

Similarly, in the area of custody, the law does not favor a particular parent because of his or her sexual orientation.⁸ For example, in M.P. v. S.P., 169 N.J. Super. 425 (App. Div. 1979), the former husband argued that the former wife's "variant" sexual orientation, namely homosexuality, made her an unfit parent because it might cause her children embarrassment in the eyes of their peers. The court rejected this argument, refusing to remove the children from the custody of their mother.⁹ The Legislature has declared that "[i]n any proceeding involving the custody of a minor child, the rights of both parents shall be equal" N.J.S.A. 9:2-4. Again, the operative standard in deciding custody issues is the best interests of the child. N.J.S.A. 9:2-3; -4.

It has also been held that the fundamental rights of parents may not be denied, limited or restricted on the basis of sexual orientation per se. The rights of a parent in the companionship, care, custody and nurture of his or her child, absent a powerful countervailing specific need to protect the child from the parent, are fundamental, essential rights -- far more precious than any property right -- protected by the First, Ninth and Fourteenth Amendments. Stanley v. Illinois, 405 U.S. 645, 651 (1972). Thus, the rights articulated in Stanley belong to homosexual parents as well as heterosexuals and may not be restricted without a showing that the parent's activities may tend to impair the emotional or physical health of the child. In re I.S. & C., 129 N.J. Super. 486, 489, 492 (Ch. Div. 1974), aff'd 142 N.J. Super. 499 (App. Div. 1976) (granting visitation to a gay father).¹⁰ See N.J.S.A. 9:2-4 (general legislative findings on parents' equal rights to custody).

In V.C. v. M.I.B., 163 N.J. 200 (2000), the Supreme Court considered whether the partner of a lesbian mother has rights to visitation and/or custody of her partner's children where there had been no second-party adoption. Making no distinction between same-sex partners and any other former unmarried domestic partners, the Court held that the former partner, whose action was based on her claim to be a "psychological parent" to the children, had standing to maintain an action for visitation and custody. The Court made clear that the four-part test it articulated would "govern all cases [not just those involving

same-gender parents] in which a third party asserts psychological parent status as a basis for a custody or visitation action regarding the child of a legal parent, with whom the third party has lived in a familial setting." 163 N.J. at 227. What is important is that the Court attached no significance whatever to the sexual orientation of the parties.

c. Termination of Parental Rights

"Although the question of the best interests of the child is dispositive of the custody issue in a dispute between natural parents, it does not govern the question of [involuntary] termination [of a natural parent's rights]." In the Matter of Baby M., 109 N.J. 396, 445 (1988). "[T]he interests of the child are not the only interests involved when termination issues are raised. The parent's rights, both constitutional and statutory, have their own independent vitality." Ibid. There is "[n]o doubt that where there has been no written surrender to an approved agency or to DYFS, termination of parental rights will not be granted in this state absent a very strong showing of abandonment or neglect." Id. at 428. The "best interests of the child" standard provides that parental rights may be terminated upon a showing of: (1) continuing endangerment to the health and development of the child; (2) the parent is unwilling or unable to provide a safe and stable home; (3) diligent efforts have been made to rectify the circumstances leading to the child's removal, and consideration has been given to alternatives to terminating parental rights, and (4) termination of parental rights will not do more harm than good. N.J.S.A. 30:4C-15.1(a); In The Matter of the Guardianship of K.H.O., 161 N.J. 337, 347 - 48 (1999).

3. Criminal Law

New Jersey criminal law provides enhanced penalties for certain crimes committed with discriminatory bias based on the presumed sexual orientation of the victim. With respect to crimes of the First, Second or Third Degree, a sentencing judge has the discretion to impose a longer-than-usual sentence if the crime was committed with the purpose of intimidating because of sexual orientation. N.J.S.A. 2C:44-3.

Similar provisions apply to lesser offenses as well. For example, simple assault and harassment are elevated from petty disorderly persons offenses to Fourth Degree offenses if committed with the purpose to intimidate because of sexual orientation. N.J.S.A. 2C:12-1; N.J.S.A. 2C:33-4.

a. Civil Liability

Additionally, N.J.S.A. 2A:53A-21 imposes civil liability for conduct which violates the Code of Criminal Justice if it is committed with a purpose to intimidate because of sexual orientation.

b. Sexual Conduct

In the past, certain sexual behavior engaged in by consenting adults of the same sex violated New Jersey criminal law. However, as earlier noted, such laws have been repealed (anti-sodomy statutes, N.J.S.A. 2A:143-1, -2, were repealed by L.1978, c. 95, §2C:98-2, eff. Sept. 1, 1979), and, in fact, have been deemed unconstitutional. See State v. Ciuffini, 164 N.J. Super. 145 (App. Div. 1978) (recognizing unconstitutionality of criminalizing private acts between mutually consenting male adults), and State v. I.O., 69 N.J. 574 (1976) (holding that private acts of fellatio between mutually consenting male adults were not subject to criminal sanctions).¹¹

4. Legal Status of Gay/Lesbian Relationships

Despite the protections contained in the various statutes discussed throughout this analysis, in several fundamental ways -- preeminently the right to marry -- same-sex relationships are not afforded the same legal status as traditional heterosexual relationships. Although our courts recognize that "[n]o specific language in New Jersey's marriage statutes prohibits same-sex marriage", Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442, 455 (App. Div. 1997), certif. den. 153 N.J. 48 (1998), they have presumed that the Legislature intended that such a prohibition exists.

The pertinent statutes relating to marriages and married persons do not contain any explicit references to a requirement that marriage must be between a man and a woman. N.J.S.A. 37:1-1 et seq.; N.J.S.A. 2A:34-1 et seq. Nevertheless, that statutory condition must be extrapolated; it is so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be fathomed. M.T. v. I.T., 140 N.J. Super. 77, 84-85 (App. Div. 1976), certif. den. 71 N.J. 345 (1976); quoted at 298 N.J. Super. at 456.]

When a challenge was made to the State's policy to provide benefits only to legally married spouses of employees -- resulting in the denial of benefits to homosexual domestic partners -- it was upheld. The court rejected the plaintiffs' equal protection argument under Article I, paragraph 1 of the New Jersey Constitution because certain heterosexuals (those related too closely by blood) also could not marry and therefore also could not qualify for benefits because of the marital requirement. Therefore, the court reasoned that since marriage was not universally available to all heterosexuals, denying the benefits of marriage to others on the basis of sexual orientation was not an equal protection violation. 298 N.J. Super. at 461-62. The result of this is that same sex couples are not legally entitled to the privileges and benefits conferred on couples opting to marry. Note, the exclusion from marriage itself has not been subject to a constitutional challenge in New Jersey to date.

a. Domestic Violence

Unquestionably, statutes prohibiting domestic violence have been deemed to apply to homosexuals as well as heterosexuals. The Domestic Violence Act protects victims of violence that occurs in a family or family-like setting. Whereas prior law used the term "cohabitants," that term has been changed to "present or former household members." N.J.S.A. 2C:25-18. This means that the Act creates the potential for redress by lesbians and gay men caught in violent relationships. Bryant v. Burnett, 264 N.J. Super. 222, 224-25 n.2 (App. Div. 1993). In the same vein, the tort action commonly known as "battered person's syndrome" is available to any victim in an intimate domestic partnership, regardless of sexual orientation. Cusseaux v. Pickett, 279 N.J. Super. 335, 344 n. 7 (Law Div. 1994).

b. Divorce

Case law has also recognized that extramarital affairs are not invariably between persons of the opposite gender. Accordingly, in a divorce matter, the former wife's lesbian relationship was held to constitute adultery so as to permit her husband to bring a cause of action for divorce. S.B. v. S.J.B., 258 N.J. Super. 151 (Ch. Div. 1992).

5. Privacy Issues

The need for confidentiality to prevent negative consequences due to revealing a party's sexual orientation has been recognized in several contexts. For example, in at least one case, a litigant who was homosexual and infected with the HIV virus was permitted to litigate a discrimination claim under a fictitious name to avoid the possibility of stigmatization from revelation of his HIV status and sexual orientation. Doe v. Tris Comprehensive Mental Health, Inc., 298 N.J. Super. 677 (Law Div. 1996).¹² Redress for violating an individual's right to confidentiality may be available. For example, one complaining of discrimination may pursue separate claims for retaliatory conduct. N.J.S.A. 10:5-12d. Nevertheless, certain circumstances require that the confidentiality needs of parties be protected.

On the other hand, those who victimize actual or perceived homosexuals may lose certain privacy rights, specifically those who commit hate crimes. Ordinarily the identity of a juvenile charged with committing an offense is not disclosed; however, law enforcement officials are required to advise the school principal of the identity of a juvenile charged with an offense that was committed with the purpose to intimidate because of the victim's sexual orientation. N.J.S.A. 2A:4A-60d.

E. Professional Conduct

1. Judges

In the Code of Judicial Conduct, Canon 3A(4) requires judges to be impartial and to avoid discrimination because of sexual orientation. Moreover, judges are responsible

for keeping such bias from permeating proceedings by requiring lawyers to refrain from manifesting sexual orientation bias, whether by words or conduct. If sexual orientation is appropriately at issue in a case, however, legitimate advocacy is not precluded. Canon 3A(5).

The commentary to Canon 5A addresses a judge's expressions of bias or prejudice and indicates that this pertains not only to serious statements but also to casual comments made in jest. Thus, a judge should not make or tolerate jokes or other remarks which demean individuals on the basis of their sexual orientation. This pertains whenever the judge is functioning professionally, but even comments made outside a judge's judicial activities may cast reasonable doubt on his or her capacity to act impartially.

2. Lawyers

When a lawyer is acting in his or her professional capacity, it is professional misconduct to engage in behavior involving discrimination based on sexual orientation if such conduct is intended or likely to cause harm. RPC 8.4(g).

3. Judicial Employees

While conducting official duties, no court employee may -- by words or conduct -- discriminate on the basis of sexual orientation. Canon 1, Subsection E. Court employees are also forbidden from being officers in any organization that practices invidious discrimination on the basis of sexual orientation. Canon 5, Subsection C.

F. Conclusion

With the notable exception of benefits and privileges associated with marriage, gays and lesbians are afforded virtually all the legal rights and protections to which all other New Jersey citizens are entitled. In this regard, the Executive, Legislative and Judicial branches have clearly stated that the public policy of this State is not to tolerate differential treatment based on sexual orientation. This puts New Jersey in the forefront among the states, many of which have yet to prohibit sexual orientation discrimination.

New Jersey is one of only eleven states offering general civil rights protection against discrimination based on sexual orientation.¹³ With regard to sexual behavior, as recently as the 1960's all states had criminal laws in some form which prohibited consensual sodomy. New Jersey's law was repealed in 1978; however, to date, a significant number of states still maintain some anti-sodomy law on the books.¹⁴

While our laws may not in and of themselves end bias or discrimination, they are tools which, with consistent enforcement, will promote fairer treatment of gays and lesbians. However, fairness achieved in the courts and in the legislature do not necessarily eliminate bias, as illustrated in the following sections of this report.